No. 06-341

In the Supreme Court of the United States

BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

BCI understands that this Court will consider simultaneously, at its January 5, 2007 conference, the petitions in the case at bar and in *Sawicki v. Morgan State University* (Case No. 06-306). For the reasons set forth below, neither the Respondent's brief in response to BCI's petition nor the petitioner's reply in the *Sawicki* case, both of which seek denial of BCI's petition, militate against granting BCI's request for review. Rather, BCI submits that its petition should be granted because there is a clear split of authority amongst the circuits[1] with respect to the important federal employment law issue of subordinate bias liability, and the BCI case—in its current posture—presents this Court with the optimal situation to provide a definitive standard for all employers, public and private.

I. THE INTERLOCUTORY NATURE OF THE JUDGMENT SHOULD NOT PREVENT CERTIORARI REVIEW

Both the Respondent in the case at bar and the petitioner in *Sawicki* argue that, because the Tenth Circuit reversed a grant of summary judgment and remanded the case for further proceedings under its new rule on subordinate bias liability,

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[1] The respondent argues, to some degree, that the circuit split on this issue is "not extensive." (Respondent's Brief, p. 9). This argument, however, is directly opposite of the views expressly held by, at least, judges on the Fourth, Seventh, and Tenth Circuits. *See Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 299 (4th Cir. 2004) (Michael, J., dissenting) (noting that the majority's decision "puts us at odds with virtually every other circuit"); *EEOC v. BCI Coca-Cola Bottling Company of Los Angeles*, (McConnell, J.) (App. 19a) (characterizing the Fourth and Fifth circuits as being at "opposite extremes"); *Lust v. Sealy, Inc.*, 383 F.3d 580, 584 (7th Cir. 2004) (Posner, J.) (stating that the *Hill* standard "is not the view of this court").

the case is of an interlocutory posture and, therefore, certiorari should not be granted. (Respondent's Brief, p. 12-14; *Sawicki* Reply Brief, pp. 7-8). None of the primary cases cited by the Respondent, however, involved the same procedural status as the case at bar. (*See id.*; *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (court of appeals remanded so that district court could determine whether union was, in fact, in contempt); *American Constr. Co. v. Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372, 384 (1893) (court of appeals remanded for modification of injunction and restraining order)). Another case cited by the Respondent, *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916), is likewise inapposite. In that case, the Court was discussing its denial (without comment) of a previous petition for writ of certiorari in the same case. The Court stated that issues raised in the first petition were not barred by the law of the case doctrine and, in doing so, offered a variety of potential reasons for the prior denial—not just the reasons cited by the Respondent:

> The decree that was sought to be reviewed by certiorari at complainant's instance was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application; besides which, it appears, by reference to our files, that the application was opposed by the present petitioner upon the ground that the case, however important to the parties, involved no question of public interest and general importance, nor any conflict between the decisions of state and Federal courts, or between those of Federal courts of different circuits.

240 U.S. at 258. In short, the cases relied upon by the Respondent do not in any way foreclose this Court's review of the case at bar.

Moreover, the statutory basis for this Court's jurisdiction in this case does not contain the impediment urged by the Respondent. *See* 28 U.S.C. § 1254(1). Indeed, "there is no requirement that there be a 'final' decision; once a case has come to be in the court of appeals, the Supreme Court may grant certiorari to review interlocutory decisions." 17 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4036, p. 10 (2d ed. 1988). As this Court has noted, its "cases make clear that there is no absolute bar to review of nonfinal judgments of the lower federal courts." *Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997) (citing cases and R. Stern, E. Gressman, S. Shapiro, & K. Geller, Supreme Court Practice § 4.18 (7th ed. 1993)).

Following this maxim, this Court has previously granted certiorari review in a case involving an important question of federal employment law that was in the same procedural posture (reversal of a grant of summary judgment) as the case at bar. *See Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). This Court has also granted certiorari review in a case, like the one at bar, wherein the EEOC filed suit, lost a motion for summary judgment, and obtained a reversal in the court of appeals. *See Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355 (1977). In fact, this Court has on many occasions agreed to review a case where the court of appeals reversed a summary disposition by the district court.[2]

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[2] *See, e.g., Town of Newton v. Rumery*, 480 U.S. 386 (1987); *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987); *California Brewers Ass'n v. Bryant*, 444 U.S. 598 (1980); *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531 (1978); *United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977); *Blackledge v. Allison*, 431 U.S. 63 (1977); *Estelle v. Gamble*, 429 U.S. 97 (1976); *United States v. Orleans*, 425 U.S. 807 (1976); *Abbott Laboratories v. Portland Retail Druggists Ass'n*, 425 U.S. 1 (1976); *Time, Inc. v. Pape*, 401 U.S. 279 (1971); *Larson v. Domestic & Foreign Commerce Corporation*, 337 U.S. 682 (1949); *Land v. Dollar*, 330 U.S. 731 (1947).

That occasion presented itself again in the present term, and this Court again granted a petition for writ of certiorari in a case where the court of appeals reversed a grant of summary judgment. *See KSR Int'l Co. v. Teleflex Inc.*, 126 S.Ct. 2965 (2006). Despite the procedural posture of the *KSR* case, and contrary to its position in the case at bar, the Solicitor General submitted a brief as amicus curiae wherein it took the position that this Court *should* grant KSR International's petition for writ of certiorari. *See* Brief for the United States as Amicus Curiae, KSR International Co. v. Teleflex Inc., 126 S.Ct. 2965 (2006) (No. 04-1350), 2006 WL 1455388.

As the Respondent's positions in this case and in *KSR* demonstrate, "[r]eview is granted or denied according to a wide range of concerns, some of which bear on the finality of the disposition below, and many of which do not." 17 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure, § 4036, pp. 31-32 (2d ed. 1988).

II. THIS CASE—IN ITS PRESENT POSTURE—REPRESENTS THE OPTIMAL SITUATION FOR DECIDING THIS ISSUE

The importance of the issue in this case, along with the circuit conflict, warrants immediate review rather than waiting for a remand, trial on the merits, and a second venture through the appellate process.

A. This case would be decided differently under the prevailing standard in the Fourth Circuit

Both the Respondent and the petitioner in *Sawicki* state that denying review here would permit the record to become more fully developed at trial. Neither of these parties, however, explain what part of the pertinent record would become more developed. The record before the district court and court of appeals was, in fact, fully developed. The parties engaged in extensive discovery, with the key players,

including the undisputed decisionmaker, being deposed twice. All of the evidence surrounding the termination decision, including the level of influence each person exerted, is included in the record. In short, all of the evidence that is necessary to make a decision exists, and there is no need to further develop the record before this Court can make a decision on the appropriate standard of subordinate bias liability.

A remand here would also be counterproductive because the trial would occur and a liability decision made under the wrong standard. As discussed below (section III(A)), the Respondent did not argue in its brief that the Tenth Circuit's standard is the correct standard; rather, it suggests that a trial should occur and then this Court can review whether the correct standard was applied. Given the state of the record, a trial is simply not a worthwhile exercise in this case.

This case would be decided differently, under the present record, if, for example, the *Hill* standard was applied. In *Hill*, the Fourth Circuit held that, in order to prove liability under a subordinate bias theory, a plaintiff "must come forward with sufficient evidence that the subordinate employee possessed such authority as to be viewed as the one principally responsible for the decision or the actual decisionmaker for the employer." 354 F.3d at 291. In the case at bar, it is undisputed that Human Resources Manager Patricia Edgar was the sole decisionmaker, and that the allegedly biased subordinate did not make any type of recommendation or otherwise provide his thoughts to Ms. Edgar regarding whether and to what extent she should issue discipline. (App. 44a, 66a). It is also undisputed that Ms. Edgar (who was based at a different location than the affected employee) did not know that the employee she terminated was African-American. (App. 65a-70a). Under this record, it is clear that the Respondent would not be able to meet its burden

under the *Hill* standard and, as such, the case at bar would be decided differently under that standard. Accordingly, this case presents this Court with a ripe issue that needs no further factual development.

B. The *Sawicki* petition does not present this Court with the proper record and issues to determine the appropriate standard of subordinate bias liability

The petitioner in *Sawicki* argues that its case "provides a more appropriate vehicle for deciding the legal issue in question than does *BCI Coca-Cola*." (*Sawicki* Reply Brief, p. 7). The sole support for this statement is that *BCI Coca-Cola* "is an interlocutory appeal." (*Id.*). An examination of the entire circumstances of the district and appellate court decisions in *Sawicki*, independent of *BCI Coca-Cola*, reveals that it offers this Court a poor avenue to consider and decide the subordinate bias liability issue. Moreover, when compared with the state of the record and the decisions of the lower courts in *BCI Coca-Cola* (as explained above), the *Sawicki* case becomes an even less attractive option for review.

The plaintiff in *Sawicki* sued a single-state employer, Morgan State University, in a teacher-tenure case, asserting multiple claims, including claims under Title VII and under 42 U.S.C. § 1983. Many claims were dismissed by the district court early in the litigation, and ultimately the Title VII claims and § 1983 claims were dismissed via summary judgment in a decision that was not published, even in an electronic format. While the petitioner in *Sawicki* highlights the district court's citation of the Fourth Circuit's decision in *Hill*, the district court actually decided to dismiss the plaintiff's Title VII claims on multiple grounds, including under a single motive analysis under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and under a mixed motive analysis under *Desert Palace, Inc. v. Costa*, 539 U.S.

90 (2003). Importantly, the district court based its decision upon the Fourth Circuit's admonition that courts must be "reluctan[t] to second-guess the inherently subjective tenure decisions of academic institutions." (*Sawicki* Petition, App. 23a-24a). In fact, the district court expressly ruled that, "[h]eeding both the Fourth Circuit's direction on judicial review of tenure decisions and the recent en banc holding in *Hill*, this Court concludes that no reasonable juror could find that the circumstances surrounding Plaintiff's tenure denial amount to unlawful discrimination." (*Sawicki* Petition, App. 24a).[3]

The plaintiff's appeal to the Fourth Circuit was pro se and involved a myriad of issues, including the district court's March 15, 2004 memorandum and order granting defendant's Rule 12 motion to dismiss some, but not all, claims, the July 7, 2004 order denying her motion for reconsideration, the March 11, 2005 order denying in part her motion for sanctions, and the August 8, 2005 memorandum and order granting defendant's motion for summary judgment on all remaining claims. (Amended Notice of Appeal, Case No. WMN-03-1600, Docket Entry No. 121). The Fourth Circuit ordered that there would be no oral argument, and that the case would be submitted on informal briefs. (Case No. 05-891, Order, August 18, 2005). Under this order, the respondent was not even required to file a response brief.

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[3] Interestingly, the petitioner in *Sawicki* criticizes the *Sawicki* respondent for "omit[ting] key prefatory language" of this quote in its response brief. (*Sawicki* Reply Brief, p. 4). In adding the "key prefatory language," however, the *Sawicki* petitioner omits the district court's reference to its reliance upon the "Fourth Circuit's direction on judicial review of tenure decisions." (*Compare Sawicki* Reply Brief, p. 4 *with Sawicki* Petition, App. 24a). This omission is glaring because the fact that *Sawicki* involves a teacher tenure issue adds a dimension to the case that makes it less appropriate for review in the subordinate bias liability context.

(*Id.*). The Fourth Circuit later issued its per curiam opinion, which is also unpublished, wherein it simply said that it reviewed the record, found no reversible error, and affirmed "on the reasoning of the district court." (*Sawicki* Petition, App. 2a).

This procedural history illustrates that the *Sawicki* petition does not constitute the optimal avenue to decide the appropriate standard for subordinate bias liability. The Fourth Circuit did not engage in any written analysis of any part of the district court's decision. Although it relied upon the district court's "reasoning," the Fourth Circuit did not explain whether, and to what degree, that included the teacher-tenure rule, the *McDonnell Douglas* analysis, the mixed motive analysis, or the district court's discussion of *Hill*. In other words, in *Sawicki*, there is no appellate court analysis of the subordinate bias liability standard for this Court to review on certiorari. Moreover, and importantly, neither the district court nor the appellate court discussed the level of influence that the supposedly bias subordinates had over the decision to defer her tenure. In reality, therefore, the *Sawicki* petitioner is asking this Court to review the *Hill* standard through the vehicle of a district court judgment—not an appellate court judgment—wherein the facts are not developed to the point of knowing the level of influence of the subordinate.

The case at bar, therefore, presents the optimal avenue to review this issue. The record is fully developed, and both the Tenth Circuit and the district court specifically dealt with the standard for subordinate bias liability. The Tenth Circuit also addressed the application of *Reeves*, whereas the *Sawicki* decisions did not address this related matter. Furthermore, whereas BCI demonstrated above that this case would have a different outcome under the application of a different standard, the *Sawicki* petitioner did not make the same

demonstration. In short, the case at bar is not only ripe, but is also the better case to decide this important issue of federal employment law.

III. RESPONDENT'S SILENCE ON KEY ISSUES WEIGHS IN FAVOR OF REVIEW

The Respondent remained silent on two key issues, and this silence is the equivalent of a concession that the subordinate bias liability issue—via the case at bar—is ripe for review.

First, although the Respondent recognized that the Tenth Circuit's opinion rejected the standard adopted in *Hill* (Respondent's Brief, p. 12), it stopped short of arguing that the Tenth Circuit's standard is, in fact, the correct standard. While the EEOC at the court of appeals level argued in favor of the standard applied by the Fifth Circuit, *see* Brief for EEOC, *EEOC v. BCI Coca-Cola Bottling Co.*, (No. 04-2220), at p. 33 (citing *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 221 (5th Cir. 2000)), the Solicitor General did not embrace that standard in its response.[4] Notably, the Solicitor General also did not embrace the Tenth Circuit's standard, which conflicts with the Fifth Circuit's opinion, as the appropriate standard to be applied in subordinate bias liability cases. Had the Respondent believed that, on remand, the trial of this case would be conducted using the correct standard, then surely that argument—and the reasons therefore—would have been made. This omission weighs in favor of this Court's review so that the federal government, as a public employer, can offer its views on when the actions

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[4] The EEOC took a similar position as amicus curiae in the *Hill* case. *See Hill*, 354 F.3d at 289. The *Hill* court declined to adopt the standard proposed by the EEOC.

of a biased subordinate can result in liability to the employer under Title VII and other federal anti-discrimination laws.

Second, the Respondent did not address the conflict between the Tenth and Fourth circuits over the proper application of *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000) (*See* Petition, pp. 12-14). Whereas the Fourth Circuit relied upon part of this Court's language in *Reeves*, 354 F.3d at 288-289, the Tenth Circuit found such reliance to be "peculiar" and "misplaced." (App. 20a). The silence on this issue likewise weighs in favor of this Court granting review so that this matter can be resolved when defining the appropriate standard of subordinate bias liability.

CONCLUSION

For all of the reasons set forth above, as well as the reasons set forth in its petition, BCI Coca-Cola Bottling Company of Los Angeles respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

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